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Supreme Court of the United States

October Term, 1966.

No. 29.

Z. T. OSBORN, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

PETITIONER'S REPLY BRIEF.

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PETITIONER'S REPLY BRIEF.

The prosecution's brief reflects only selective portions of the record and in consequence fails to present an accurate account of the facts in this case. The present reply is accordingly required as an indispensable corrective. It will not reargue matters already presented on behalf of petitioner in the brief in chief.

I. VICK WAS NO PRIVATE CITIZEN BUT, TO THE CONTRARY, WAS AN AGENT OF THE UNITED STATES IN LAW AND IN FACT.

Although the prosecution says nothing about Vick's offers to change his testimony in return for a cool quarter of a million dollars, see full references at Pet. Br. 14-15, nor concerning his unsavory past (Pet. Br. 16), this individual upon whose testimony the present conviction in large measure rests is now recognized as sufficiently malodorous that the prosecution seeks to disavow him—at least partially—by calling him "a private citizen" (Pros. Br. 46) and by denying that he was ever a government agent (Pros. Br. 19 n. 4, 46 n. 9, 48 n. 10).

The record refutes this belated effort by the prosecution to repudiate its shabby collaborator.

Vick was no private citizen. He testified (R. 128a) that "I am a policeman," and at the time of trial, though still employed by the Nashville Police Department, he admitted that "I am on special assignment to the Federal Government" (R. 192a). See also, *accord,* R. 128a-129a, 231a-232a. Vick had also been a divorce investigator, i.e., he "would go out and get evidence against a man or woman to be used in a divorce case" (R. 218a). At the time of the events charged in the indictment, so he said from the witness stand, "I was an undercover agent, so to speak, and was trying to get information" (R. 248a).

Of course agency cannot be proved by the agent, nor do we contend for a moment either that Vick was on the Federal payroll, or that he took the statutory oath required by R. S. § 1757 (5 U. S. C. § 16), or that he had either the benefits of or was subject to the re-

strictions contained in the voluminous and extensive provisions of Title 5 of the United States Code. What we do say is that he worked for the United States, subject to the directions of the representative of the Department of Justice in charge of the investigation, and that in consequence he acted for the United States in fact and was an agent of the United States as a matter of law.

Vick reported to the F. B. I. as early as February 1963 (R. 253a). In June he told the F. B. I. that he wished to supply information. His offer was at that time declined (R. 251a, 257a). Vick finally admitted he assumed the "role" in July 1963 (R. 228a).

Later, in August or September, Vick had a number of talks with Walter J. Sheridan (R. 167a), the man who directed the investigation as a representative of the Department of Justice (R. 188a). Vick had these talks when he feared loss of his job (R. 224a). Both Vick and Sheridan, prosecution witnesses at the trial, agreed that Vick was requested to report only information concerning illegal activities (R. 225a-226a, 273a); in Sheridan's words, "I asked him [Vick] in the course of his activities he became aware of any information concerning illegal activities that *I would like him to represent me* (R. 166a; italics added).

As early as June 1963, Vick had told the FBI that he "desired an arrangement with the Government wherein he would be protected from prosecution for furnishing information" (R. 258a). He later told Sheridan that he wanted a clean bill of health (R. 221a-225a). Inasmuch as Vick has never been prosecuted for his connection with the charge of which petitioner stands convicted, and was still on the local police pay-

roll at the time of the trial without doing any work whatever (R. 231a-232a), it follows that the Government kept its promise, and that Vick's testimony that he was not promised or paid anything for the information furnished (R. 214a, 230a) is shown on its face to be false. (Interestingly enough, while the prosecution relies on Vick's testimony to that effect at Pros. Br. 18, on the next page, Pros. Br. 19, it admits the fact of Vick's offer in June to supply information in exchange for protection from prosecution.)

The record shows that, after his first contacts with the F. B. I. and with Sheridan, Vick begged petitioner for employment, pretending to fear loss of his job, and speaking of his need for money. See references at Pet. Br. 6. Finally, on October 28, petitioner reemployed Vick for background investigation of jurors (R. 197a-198a), a fact Vick quickly telephoned to Sheridan on the same day (R. 653a). Certainly the fact of employment was not an "illegal activity."

At the hearing on the motion to suppress, and also at the trial, Vick denied ever having mentioned the juror Elliott to anyone before mentioning his name to petitioner (R. 130a-343a). But later at the trial, when confronted with Sheridan's report, Vick admitted that he had mentioned Elliott to Sheridan on October 21 (R. 348a-349a), a week before he was reemployed by petitioner.

After such reemployment, and after Vick had mentioned Elliott's name to petitioner and had reported the conversation to Sheridan, the latter "said that would I just play it by ear, so to speak, and continue discussions with Mr. Osborn and report it to him" (R. 137a). When Vick thereafter entered Osborn's office wired for sound, with a recorder strapped to his person, it was Sheridan who sent him (R. 190a).

It follows that, on familiar and long settled principles, Vick acted as an agent of the United States even though he was not formally an employee of the United States. In strictness, Vick was Sheridan's agent and thus a subagent of the United States. We set forth below the pertinent paragraph of the *Restatement, Second,* on *Agency:*

> "§ 1(1) Agency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act.
>
> "(2) The one for whom action is to be taken is the principal.
>
> "(3) The one who is to act is the agent.
>
> * * *
>
> "§ 3(1) A general agent is an agent authorized to conduct a series of transactions involving a continuity of service.
>
> * * *
>
> "§ 5(1) A subagent is a person appointed by an agent empowered to do so, to perform functions undertaken by the agent for the principal, but for whose conduct the agent agrees with the principal to be primarily responsible.
>
> * * *
>
> "§ 15 An agency relation exists only if there has been a manifestation by the principal to the agent that the agent may act on his account, and consent by the agent so to act.
>
> * * *

> "§ 26 * * * authority to do an act can be created by written or spoken words or other conduct of the principal which, reasonably interpreted, causes the agent to believe that the principal desires him to act on the principal's account."

It is not necessary to labor the point. Vick was Sheridan's agent and hence the subagent of the United States—which has used the results of his activity and has never disavowed or repudiated him, and still does not do so, however much its brief indicates that it would somehow prefer him to have had a different status.

Even the trial judge was moved to say "Well, Mr. Vick was a rather confusing witness, to say the very least of it. To say now just what he did testify would be a rather difficult thing to do."

The cynicism of Vick towards law in general is revealed when he in talking about the trial judge to his friends he said "Now whenever you have jury tampering, wherein Tommy's case. That s.o.b. can sit up on that bench and do anything, and get away with it . . ." "That's right . . . damn judge will sit up and he'll do just about anything and get away with it. And the Supreme Court won't reverse it" (R. 325a-327a).

The prosecution's present efforts, to insist on the one hand that what Vick obtained was competent evidence, and to insist on the other that he was only "a private citizen" (Pros. Br. 46) and that he was in no sense a government agent (Pros. Br. 19 n. 4, 46 n. 9, 48 n. 10), founders on the record and fails as a matter of law. But at least the latter aspect of the matter comes close to, if indeed it does not involve, an admission that with Vick actually acting on behalf of the United States, as indubitably he did, petitioner's case becomes

infinitely stronger and that of the prosecution perceptibly weaker.

The foregoing argument is independent of, and does not rest in any degree on, the testimony of Samuel Eugene Wallace, Esq., a Nashville lawyer.

Wallace testified, among other matters, to meeting with Vick about a week or ten days *after* petitioner had been disbarred (R. 582a), an event shown elsewhere in the record to have taken place on November 21, 1963 (R. 58a-77a).

At that meeting, Vick told Mr. Wallace that he had gone on the Federal payroll in May. "And he told me that night sitting up there at a table that his assignment was to get Tommy [Osborn, the petitioner] and to get me. * * * He said, 'I got Tommy but I found out that you didn't have anything to do with it. * * *' " (R. 582a). This was the same Wallace that Vick admitted he went to see in September 1963 with the jury list (R. 269a-271a).

II. THE JUDGES' AUTHORIZATION OF THE RECORDINGS WAS HIGHLY IMPROPER.

We argued (Point II, Pet. Br. 20-21, 31-36) that, quite apart from the admissibility [1] of the concealed re-

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1. Where entrapment is an issue it is manifestly wrong to record and then play at the trial the *last* conversation after a series of conversations. In *Mapp v. Ohio*, 367 United States 643, 662, Justice Black concurring stated:

> ". . . that when the Fourth Amendment's ban against unreasonable searches and seizures is considered together with the Fifth Amendment's ban against compelled self-incrimination, a constitutional basis emerges which not only justifies but actually requires the exclusionary rule."

In *Boyd v. United States*, 116 U. S. 616, 633, this Court fully discussed this relationship and declared itself "unable to perceive that the seizure of a man's private books and papers to be used in evidence

cording, in respect of which we asked the Court to reconsider or at least to limit the Olmstead-On Lee-Lopez line of cases; contending that the recording was unlawfully obtained because it was the fruit of improper judicial collaboration with law enforcement officers prior to trial, and hence should have been excluded quite apart from constitutional considerations.

To this the prosecution makes two replies.

First, it says that the judges were obliged to follow up the information they receive in order to protect the integrity of the administration of justice and to discipline counsel, citing generalized authorities to that effect, including one where a different result was reached on rehearing (Pros. Br. 38-39; *In re Isserman,* 345 U. S. 286, cited at p. 38, was reversed on rehearing, 348 U. S. 1).

Next, it says that the procedure followed "was analogous to the procedures followed in obtaining a search warrant," so that "petitioner mistakes a virtue for a vice" (Pros. Br. 36).

Both propositions are demonstrably specious; we shall deal with them in order.

One. We do not quarrel in any degree with the principle that courts must protect themselves against improper practices or that, if improper conduct on the part of officers of the court is discovered either with or without extended investigation, disciplinary measures are in order. But petitioner's disbarment is not in issue here; as the prosecution admits, that proceeding is now pending in the Court of Appeals (Pros. Br. 38); and

against him is substantially different from compelling him to be a witness against himself. In *Wong Sun v. United States,* 371 U. S. 471, 484-86, this Court ruled that a verbal statement is an "effect" protected by the Amendment.

while we are concerned over the circumstance that the order to show cause why petitioner should not be disbarred had been prepared *in advance* of his first confrontation with the judges (R. 363a-366a; Govt. Ex. 13, R. 370a-381a)—as indeed the prosecution's studied omission of that circumstance (Pros. Br. 13) reflects concern on its part also—all of the disbarment issues are purely collateral here.

Here only petitioner's criminal conviction is in question. And here the vice of the proceeding lies in the fact that, while the agents of the United States had petitioner under investigation, they first submitted the fruits of their investigation to both United States judges in the district. Next, without either statutory authority or decisional precedent, they undertook to obtain advance approval for their next investigative step, which was to send Vick back to Osborn carrying a concealed recorder. Finally, after the recorder had worked on the third try, the recording was played back to the judges.

Thus the judges, instead of holding the scales even between prosecution and defense, allied themselves with the Department of Justice and the F. B. I. while the investigative process was still underway, and turned themselves into policemen.

Judges simply have no business to participate in searching for evidence of crime. Because, once they do, they align themselves with one of the parties, and thus they destroy the independence of the judiciary—to say nothing of degrading the judicial process. When judges become policemen, when the judiciary joins in partnership with the prosecution, then equal justice under law is at an end.

Two. We have already set forth (Pet. Br. 31-33) some reasons why what was done could not be equated with the search warrant procedure that the court below invoked in a footnote (R. 56 n. 1).

We pointed out that in the case of a search warrant the officer serving that instrument announces his status and produces the warrant; here, however, Vick concealed the fact that he was acting on behalf of the United States, and of course he did not produce any warrant: There was none. Similarly there was no written evidence of the judges' authorization, since of course to have produced evidence of it would most effectually have frustrated the very purpose of Vick's visit.

We also pointed out that, when an actual search warrant is executed, the fruits of the search are never brought to the magistrate until they are produced in the course of a trial.

We should further have mentioned, no doubt omitting to do so because of its obviousness, that there has never been any statutory sanction for search warrants in connection with the carrying of concealed recorders, nor any decisional precedent for such a step.

Indeed, the whole discussion of search warrants that has been injected into this case is unreal and literally fictitious, however much it may reflect zeal to uphold a prosecution that rests on evidence obtained through the collaboration of the Department of Justice with the Federal judiciary.

In this Court, the prosecution takes inconsistent positions, no doubt hoping that, as in a true-false test, one of its answers must be right.

On the one hand, the prosecution invokes the search warrant analogy, asserts that "petitioner mistakes a

virtue for a vice," and that "the judges' participation here * * * is to be favored rather than disapproved" (Pros. Br. 36-37). On the other, the prosecution argues against the view of the *amicus curiae* in this case that "the equivalent of a warrant is constitutionally required before the government may employ the services of an informant," because "it finds no precedent in the history of [the Fourth Amendment's] administration" and because "Its wisdom is * * * properly a matter for legislative consideration, not for judicial decision" (Pros. Br. 32 n. 5).

The simple answer is that the prosecution's objections to the search warrant analogy invoked by the *amicus curiae* in respect of informants are equally applicable in every respect to the search warrant analogy invoked by the prosecution in respect of the concealed tape recorder. Both are equally fictitious.

We submit that, for the reasons already set forth, the search warrant analogy is specious in the extreme, and, particularly in the circumstances of this case, wholly extraneous.

Under the doctrine of *On Lee v. United States,* 343 U. S. 747, and, preeminently, under the rule of *Lopez v. United States,* 373 U. S. 427, the latter case decided in May 1963, the use of a hidden recorder on the person of a government undercover agent in November 1963 was perfectly lawful. Such use had the formal imprimatur of this Court, nor did it require the "me too" of any district judge as an additional cachet of respectability. If Messrs. Sheridan *et al.* had simply affixed the recorder to Vick on their own, any recordings so obtained would have been admissible as long as *On Lee* and *Lopez* stood—and of course both decisions

still stand until and unless this Court in the present case overrules or limits them.

Consequently, on the law as it stood—and still stands on this day, no matter how strongly we happen to disagree with it (Pet. Br. 27-30)—it was not necessary for Sheridan and his subordinates to seek judicial approval as a prerequisite to the lawfulness of their scheme to send Vick to petitioner wired for sound.

When Sheridan and his men took the matter to the judges for a further authorization that the law did not require and for which there was no precedent, they accomplished only the improper end of seeking judicial allies in their hunt for evidence of wrongdoing. And when the judges then became the associates and the collaborators of the Department of Justice and of the Federal Bureau of Investigation, when the judges themselves became active participants in the business of apprehending suspected offenders, their action forever tainted the evidence obtained by Vick on his concealed recorder, quite apart from constitutional considerations.

This Court in the exercise of its supervisory capacity should rule, unequivocally and in terms not susceptible to future misunderstanding, that evidence obtained by law enforcement officers of the United States at the direction and with the collaboration of United States judges, is utterly inadmissible for any purpose. Evidence so obtained impairs the impartiality of the judiciary, necessarily saps their independence, and cannot be squared with American concepts of the judicial function under a written constitution.

III. THE RECORD ESTABLISHES ENTRAPMENT AS A MATTER OF LAW.

The prosecution's account of the sequence of events that preceded and led to the conversation between Vick and petitioner on November 11, 1963, the one was recorded on the instrument concealed on the former's person, is so incomplete and selective that in its totality it is demonstrably inaccurate.

Like the court below (R. 49-56; cf. R. 61), the prosecution fails to put that final conversation into context, in consequence of which its brief here never discloses how that last talk was simply "part of a course of conduct which was the product of the inducement" (*Sherman v. United States,* 356 U. S. 369, 374).

Actually, Vick had started reporting to the F. B. I. as early as February 1963 (R. 253a). On June 4, he told the F. B. I. that he planned to work for petitioner and offered to make available to the F. B. I. any information he might obtain (R. 257a). Thereafter, in August or September, he had several conversations, numbers and dates not specified, with Walter J. Sheridan (R. 167a), about working for the Government in order, as he termed it, to get a clean bill of health (R. 273a), at a time when he was greatly concerned with losing his job in the sheriff's office (R. 224a-225a).

Significantly, Vick made his arrangements with Sheridan, who testified that "I would like him [Vick] to represent me" (R. 166a), *before* he approached petitioner for reemployment (R. 225a).

In September the plot thickened. Before being employed by petitioner, Vick sought to tempt another Nashville lawyer, Samuel Eugene Wallace, Esq., by bringing the latter a copy of the jury list that Vick had

obtained on his own, telling Mr. Wallace that he had a cousin on the jury, and asking Mr. Wallace whether he thought a juror would be worth $50,000 to Hoffa (R. 269a-271a, 576a-580a). Significantly, the prosecution *never once* mentions Vick's September approach to Mr. Wallace with the identical proposition that he subsequently made to petitioner in November.

Also in September, the F. B. I. laboratory in Washington sent to its Nashville office the tape recorder that Vick subsequently wore on his later visits to petitioner's office (R. 187a).

The record does not show the full content of the conversations between Vick and Sheridan in August and September of 1963 (R. 167a), but after petitioner had been disbarred, Vick once more sought out Mr. Wallace to tell the latter that Vick had been on the Federal payroll since May, and "that his assignment was to get Tommy [Osborn, the petitioner] and to get me. * * * He said, 'I got Tommy but I found out that you didn't have any thing to do with it. * * *' " (R. 582a).

At the hearing of petitioner's motion to suppress the tape recording Vick had obtained, Vick denied flatly that he had ever mentioned to anyone the fact that his cousin Elliott was on the jury until he had so advised petitioner (R. 130a). Vick made the same denial while testifying at the actual trial (R. 343a). But, a little later, when confronted with a Jencks Act document—a report made by Sheridan—Vick then *admitted* that, on October 21, 1963, he had told Sheridan that his cousin Elliott was on the jury list (R. 349a), obviously not an "illegal activity". The prosecution never admits that, in fact, Vick so advised Sheridan before his own reemployment by petitioner, a circumstance that puts the prosecution in the position of

underwriting Vick's palpable misstatements, untruths that Sheridan's own contemporary report exposes as such (R. 348a-349a).

It was not until a week after Vick's mention of Elliott to Sheridan that petitioner yielded to Vick's importunities and to his tales of financial straits and potential unemployment, and finally *reemployed* him. See extensive references at Pet. Br. 6. Vick repaid petitioner's kindness by immediately reporting his employment to Sheridan (R. 653a); this was an occupation for which he had hankered at least since early June, nearly five months earlier (R. 257a), and which he had told Mr. Wallace in September he would again get from petitioner (R. 577a).

Perhaps it should be specifically emphasized that the background investigation of jurors for which Vick had been hired was a perfectly proper activity. It was on precisely the facts to be found by Vick—race, religion, and education—that petitioner as counsel for Hoffa and later in his own capacity as defendant relied in challenging jury arrays as improperly selected. See *Hoffa v. Gray,* 323 F. 2d 178 (C. A. 6), certiorari denied, 375 U. S. 907; R. 9a-54a, R. 1b-11b, R. 441a *et seq.*

In this connection it is of the highest significance that although Vick testified positively that petitioner had hired him to investigate the jurors in Judge Miller's court (R. 197a, 200a), Vick on his own volunteered that he knew some members of the jury in Judge Gray's court, among whom was his cousin Elliott (R. 200a-201a). It was the latter list that in September Vick had unsuccessfully sought to peddle to Mr. Wallace. Cf. (R. 271a). Vick had also told Polk, an investigator for petitioner that "he knew three of the people on the jury panel" (R. 201a, 654a), *before* he mentioned

Elliott to petitioner. Yet the prosecution makes much of the fact that petitioner told Vick to assure Elliott that he would not be alone. But that was what Vick had told petitioner and Polk.

Just who originated the idea of having Vick tell Osborn of his cousin Elliott on the jury was never satisfactorily determined. After Vick had advised Sheridan that Elliott was on the jury, Sheridan "said that would I just play it by ear, so to speak, and continue discussions with Mr. Osborn and report it to him" (R. 137a, 138a). Sheridan knew that Vick would pretend to petitioner that he had talked to Elliott (R. 139a) when in actual fact Vick never had any intention of doing so (R. 140a). Vick's purpose in lying to petitioner "was to reveal the plan to the Department of Justice" (R. 140a).

Whose plan? Vick insisted he did not know how to answer "where did the idea of pretending that you were going to contact Elliott come from?" (R. 260a). What Vick did know, however, was that "I was trying to find out what Mr. Osborn's intentions were and prove it, and make a case" (R. 266a). Vick did know that he told petitioner he *had* seen the juror in order to find out what petitioner was going to do (R. 263a).

In *Sherman v. United States,* 356 U. S. 369, 375, 376, two previous convictions for narcotics were deemed insufficient to prove that petitioner had a readiness to sell narcotics. Surely an acquittal on Count 2 of the Beard matter stands on a higher ground and gives less reason to support an inference that petitioner was engaged in a line of criminal conduct to justify the tactics of the prosecution in this case, particularly when the prosecutor himself stated that when the Beard matter had come to his attention "There is nothing to that,

don't go into that" (R. 32b). It is also important to note that in the indictment that was returned on May 9, 1963, petitioner was not one of the defendants.

No doubt, Vick made his case—at least up to now. But it must be emphasized that the full picture of petitioner's entrapment does not appear from the final recorded conversation. That one was simply the last of a long series. As we have seen, Vick formed the intention of becoming an employee of petitioner as early as June (R. 257a), and he still had the same intention when he went to see Mr. Wallace in September (R. 577a). His original intention was "to get" both petitioner and Mr. Wallace (R. 582a), perhaps Polk (R. 201a), but when none rose to the bait, Vick concentrated on petitioner.

Vick was not a mere informer, he was a tempter. He discussed his plans with Sheridan, the man in charge (R. 188a), and Sheridan told him "that I would like him to represent me" (R. 166a). Later, when the trap was sprung, Sheridan told Vick "would I just play it by ear" (R. 137a).

Thus we have, not the situation of *On Lee,* where there was no entrapment, nor of *Lopez,* where the idea of bribery *originated* with the defendant. Indeed Lopez never claimed that the purpose of the investigations was to induce the bribe. We have instead a situation where (*Sherman v. United States,* 356 U. S. 369, 384 [concurring opinion]):

> "The power of government is abused and directed to an end for which it was not constituted when employed to promote rather than detect crime and to bring about the downfall of those who, left to themselves, might well have obeyed the law. Human

> nature is weak enough and sufficiently beset by temptations without government adding to them and generating crime."

Here Vick, whom Sheridan had told "that I would like him to represent me" (R. 166a), admitted "that his assignment was to get Tommy" (R. 582a). He did precisely what he was assigned to do. The prosecution admits that Vick "set the stage;" (Pros. Br. 44), but the evidence is clear that if the stage had not been "set" there would have been no performance. We submit that the result amounts to entrapment as a matter of law, with the result that the present conviction cannot be permitted to stand.

IV. THE ADMISSION OF THE PROSECUTION'S REBUTTAL EVIDENCE CONSTITUTED PREJUDICIAL ERROR.

The prosecution's brief does not include the incidents of the rebuttal testimony at the trial in its statement of facts; it omits that issue from its listing of questions presented, although still including it when opposing review (cf. Br. Op. 2 with Pros. Br. 2); and in the process of dealing with petitioner's contentions, it advances legal propositions that are obviously untenable on their face. Accordingly, we think it would be helpful, by way of preliminary, to restate the facts of record relating to the rebuttal issue.

First. After the defense rested, the prosecution offered by way of rebuttal the testimony of the two judges for the Middle District of Tennessee, such testimony to be confined "to the proposition of whether there was any entrapment" (R. 651a); the prosecutor said that he wanted "to show what information the

Government had at the time the tape recording was authorized" (R. 652a).

Then, although the judges' authorization for Vick to carry a recorder was already in evidence for all purposes (R. 383a-385a), the judges were permitted to testify that they authorized Vick to carry the recorder (R. 651a-660a).

Further, although Vick's affidavit, originally offered as part of the prosecution's case in chief after he had testified at length, had then been excluded (R. 406a-408a), his affidavit was admitted in rebuttal to show what was before the judges when they authorized the use of the recorder (R. 653a-655a).

Both judges testified over petitioner's objections (R. 651a, 652a, 655a-656a, 658a), and a later motion to strike their testimony was denied (R. 661a-663a). Vick's affidavit was similarly objected to (R. 653a, 655a), and although the prosecution was agreeable to a limiting instruction in respect of the affidavit (R. 662a), none was given. (We do not understand the prosecution's present argument (Pros. Br. 58) that "Petitioner is hardly in a position now to object to the failure to give a limiting instruction." Plainly, if petitioner had agreed to such an instruction he would have waived his unequivocal objection to the affidavit, both at the trial as well as on appeal. The point of the court's refusal to give the limiting instruction that the prosecution suggested is that simply emphasizes the error it committed.)

Second. None of the evidence given on rebuttal over the foregoing objections had the slightest bearing on the issue of entrapment, in respect of which it was ostensibly offered. The recording was already in evidence (Govt. Ex. 12, R. 212a, 741a-749a), the fact of

the judges' authorization was already in evidence for all purposes (R. 383a-385a), Vick had already testified at great length to all his conversations with petitioner (R. 191a-350a), and there had been not the slightest suggestion that any of his testimony involved recent contrivance.

The situation in respect of entrapment would not have been changed in the slightest degree if the recorder had been concealed on Vick's person simply on Sheridan's say-so without any involvement whatever on the part of the judges. And the challenge to the introduction of the recording Vick finally obtained was based on a pure question of law, and so was not for the jury in any event; whether or not the recording had been authorized, or the effect of the authorization, if any, were plainly questions only for the court.

Third. The prosecution now advances two arguments in support of the rebuttal evidence, both of which involve misapprehensions of the hearsay rule so thoroughgoing as to be, literally, weird.

1. In response to petitioner's documented assertion that the judges' authorization was already in evidence for all purposes (Pet. Br. 47, citing R. 383a-385a), the prosecution says (Pros. Br. 55 n. 14), "It is true that no limiting instruction was sought or given when the transcript of the hearing was read, but that did not, we submit, establish, under the hearsay rules, the fact of authorization."

This is, of course, purest nonsense. "A rule of Evidence not invoked is *waived.*" 1 Wigmore, *Evidence* (3d ed. 1940) § 18, p. 321. Moreover, hearsay *vel non* is obviously never a jury question, and in the absence of objection hearsay fully admitted plainly has probative value. It is for this reason that, in appro-

priate cases, the erroneous admission of hearsay evidence constitutes reversible error, i.e., the jury gave it probative value by believing it when they should never have heard it.

2. In response to the many authorities cited to demonstrate the inadmissibility of Vick's affidavit (Pet. Br. 47, ¶ *Fourth*), the prosecution not only rejects out of hand the whole law regarding the inadmissibility of prior consistent statements—"it was a statement made contemporaneously with the events and it therefore had substantially more probative value—particularly when specific dates became an issue, as they did at trial—than a statement made substantially after the event" (Pros. Br. 57 n. 15)—it jettisons as well the basic rationale of the hearsay rule.

Here is what the prosecution now says in support of the Vick affidavit: "it was a *sworn* statement, and that gave it an added measure of reliability" (Pros. Br. 57 n. 15; italics in original).

That is simply more nonsense; affidavits are hearsay equally with unsworn statements, and both are equally inadmissible.

> "* * * it is clear that a mere affidavit—*i.e.* a statement made under oath before an officer—is inadmissible. * * * This principle has been constantly recognized and enforced judicially." 5 Wigmore, *Evidence,* § 1384.
>
> "The requirement of cross-examination, or an opportunity therefor, which is the essential feature of the Hearsay rule * * * is clearly not satisfied when an affidavit is offered, because, though under oath, it is uttered 'ex parte,' without notice to the opponent to afford him the opportunity of cross-examination." 6 Wigmore, *Evidence,* § 1709.

We confess our surprise that anyone even cursorily conversant with the basic principles of the Anglo-American system of evidence in trials at common law should seriously advance the proposition just quoted from the prosecution's brief.

Fourth. In seeking to support the reception of the judges' testimony, the prosecution says (Pros. Br. 57):

> "The very broad discretion assigned to district judges to permit evidence in rebuttal which might have been presented during the case in chief is well established. See, *e.g., Goldsby v. United States,* 160 U. S. 70."

That passage does not meet our objection that what was testified to by the judges, offered on "the proposition * * * of whether there was any entrapment or not" (R. 651a), was not rebuttal. In the *Goldsby* case the holding was that the challenged testimony *was* rebuttal; this Court said (160 U. S. at 74):

> "The government called a witness in rebuttal, who was examined as to the presence of the defendant at a particular place, at a particular time, to rebut testimony which had been offered by the defendant to prove the alibi upon which he relied. This testimony was objected to on the ground that the proof was not proper rebuttal. The court ruled that it was, and allowed the witness to testify. It was obviously rebuttal testimony; however, if it should have been more properly introduced in the opening, it was purely within the sound judicial discretion of the trial court to allow it, which discretion, in the absence of gross abuse, is not reviewable here."

Plainly, that is not this case.

Fifth. Indeed, if it were, we are prepared to demonstrate that to permit these judges to testify, one in his own courtroom (R. 651a), the other stepping down from the bench to the witness chair (R. 658a), was indeed an abuse of discretion.

As we have said (Pet. Br. 49), the testimony "was opinion evidence by judges that in their opinion petitioner had been proved guilty." For the prosecution now to argue (Pros. Br. 56) that "There is no substance whatsoever to this contention" involves, as we can easily demonstrate, either sophistry or else utter lack of comprehension.

The judges testified that the charges against petitioner were so serious that they needed to be investigated (R. 657a, 659a-660a). They then authorized the recording and had it played back to them, after which they instituted disbarment proceedings (R. 371a-434a), in consequence of which petitioner was disbarred (R. 510a).

Or, in other words, "First we investigated and then disbarred"; the Q. E. D. in the equation is that in the judges' view petitioner was guilty. For, obviously, one does not disbar for good conduct.

Indeed, Judge Miller testified (R. 659a-660a), "So I therefore decided that the best course to take was to allow a tape recorder to be used which would either clear this man or would prove that he was guilty."

That is why we say that what the judges testified to on rebuttal was, inescapably, opinion evidence of petitioner's guilt—and evidence that had absolutely nothing whatever to do with the entrapment issue on which their testimony was adduced (R. 651a).

On Count One, as the jury's questions after retiring show (R. 730a-734a), the case was not open and shut. The determinative factor, plainly enough, was the final crushing weight of the judges' improper rebuttal testimony. Even if that issue stood alone, even if there were no other questions in the case, the error in permitting the judges to testify was so prejudicial that the present conviction cannot be allowed to stand. *Kotteakos v. United States,* 328 U. S. 750.

CONCLUSION.

For the foregoing additional reasons, the judgment of conviction should be reversed.

Respectfully submitted,

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OCTOBER 1966.

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